IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AVARY LEIGH, et al.

v. : Civil Action No. DKC 10-0218

BOTTLING GROUP, LLC

ORDER CONCERNING NOTICE OF PENDENCY AND SETTLEMENT OF COLLECTIVE ACTION

On January 27, 2010, Plaintiff Avary Leigh, on behalf of himself and similarly situated others, filed a complaint against Defendant Bottling Group, LLC, seeking unpaid regular and overtime wages pursuant to the Fair Labor Standards Act of 1938 ("FLSA"), as amended, 29 U.S.C. §§ 201, *et seq*. The complaint alleges that Mr. Leigh was employed by Defendant as a Relief Pre-Sell Representative from approximately September 15, 2008, to December 8, 2009; that he regularly worked in excess of forty hours per week without receiving overtime compensation; and that he was frequently required to work "off the clock," after his regular shifts had ended, without compensation. The complaint further states that Mr. Leigh is similarly situated to other Relief Pre-Sell Representatives who "were, are, or will be employed by Defendant within three years from the commencement of this action" and were not, or are not being, compensated for all hours worked and/or at the overtime rate for hours worked in excess of forty per week. (ECF No. 1 ¶ 37).

Defendant answered the complaint, denying all material allegations and asserting a number of affirmative defenses, including that Mr. Leigh and other Relief Pre-Sell Representatives were exempt employees. On March 30, 2010, a notice of consent to join the suit was filed by Plaintiff Leonard W. Smith, III. He was added as a plaintiff on the same date.

Plaintiffs subsequently filed an unopposed motion to approve settlement of FLSA claims, as well as a memorandum in support, with attachments, including a fully executed stipulation and settlement agreement. After the court expressed concern regarding the proposed settlement procedure, the parties jointly filed a revised stipulation and settlement agreement, attaching, *inter alia*, a proposed notice of collective action settlement and an opt-in claim form. (ECF No. 25). By a memorandum opinion and order issued March 29, 2011, the court denied Plaintiffs' motion, but identified an appropriate procedure whereby the putative plaintiffs could be provided notice of the proposed settlement and afforded the opportunity to opt-in and be heard prior to approval. Accordingly, the court "permit[ted] the parties to amend and re-file their motion and supporting documents, requesting conditional certification of the collective class and facilitation of notice of the proposed settlement to putative class members." (ECF No. 27, at 10).

On April 19, the parties jointly filed a document entitled "Submission of Amended Exhibits Pursuant to Order Dated March 29, 2011," attaching an amended notice of the FLSA collective action and proposed settlement, opt-in claim form, and proposed order granting conditional approval of the settlement. (ECF No. 30).[1] On the same date, they filed a stipulation agreeing that the revised attachments supersede the documents attached to the previously-filed revised stipulation and settlement agreement. (ECF No. 31).[2] Although the "submission" was docketed as a notice, the court construes it as a motion for "an order certifying the action as a Collective Action and approving the settlement of the Action in accordance with a Stipulation and Settlement Agreement of FLSA Collective Action Claims," the relief requested in the proposed order. (ECF No. 30-3, at 3).

Upon consideration of that motion, it is this 18th day of May, 2011, by the United States District Court for the District of Maryland, ORDERED that:

---

[1] Also attached is a proposed final judgment and order of dismissal with prejudice, which contemplates final approval of the settlement after notice and a hearing.

[2] A supplemental stipulation signed by Mr. Leigh was filed the following day. (ECF No. 32).

1. The FLSA claims asserted in this action may conditionally proceed as a collective action. Should, for any reason, the settlement not become final, the fact that the parties were willing to stipulate to the certification of a collective action as part of the settlement shall have no bearing on, nor be admissible in connection with, the issue of whether a collective class should be certified in a non-settlement context;

2. Plaintiff Avary Leigh is conditionally appointed and designated, for all purposes, as the representative of the collective action ("Named Plaintiff");

3. Alan G. Crone and John C. Fredrickson, counsel of record for Plaintiffs Avary Leigh and Leonard W. Smith, III, are conditionally appointed and designated as counsel for the collective action ("Plaintiffs' Counsel"). Plaintiffs' Counsel are authorized to act on behalf of all persons employed by Defendant Bottling Group, LLC, as Relief Pre-Sell Representatives at any time between January 27, 2007, and January 1, 2011, in the Chesapeake, Michigan, Minnesota, New England, Upstate New York, or Western Pennsylvania market units ("Potential Plaintiffs") with respect to all acts or consents required by, or which may be given pursuant to, the settlement, and such other acts reasonably necessary to consummate the settlement. Any Potential Plaintiff who opts-in to the

settlement may enter an appearance through counsel of such individual’s own choosing and at such individual’s own expense. Any Potential Plaintiff who does not enter an appearance through counsel, or indicate a desire to represent him or herself, will be represented by Plaintiffs’ Counsel;

4. The court approves, as to form and content, the Notice and Opt-In Claim forms attached hereto;

5. The court confirms Rust Consulting as the Claims Administrator in this case (“Claims Administrator”). Within twenty (20) days of the date this Order is entered, the Claims Administrator will mail copies of the attached Notice and Opt-In forms to all Potential Plaintiffs. The Claims Administrator will mail these documents to each such person at the last known mailing address maintained in Defendant’s records or at such other address as may be determined by the Claims Administrator through research of publicly available internet databases;

6. Should any such mailing by the Claims Administrator be returned by the United States Postal Service as undeliverable, the Claims Administrator shall use its best efforts to update the address of the individual to whom the mailing was sent, using publicly available internet databases, and shall resend the mailing to any such new address within three days of receipt of the returned mail;

7. Any Potential Plaintiff receiving the aforementioned Notice and Opt-In forms who wishes to participate in the settlement shall return his or her Opt-In form to the Claims Administrator, postmarked no later than August 8, 2011. After opting-in, any plaintiff may object to the proposed settlement by filing written objections with the court in advance of the settlement hearing and/or by appearing and being heard at the settlement hearing. At any time prior to approval of the settlement, any plaintiff who has opted-in will be permitted to withdraw from the case by filing written notice with the court and/or by appearing and being heard at the settlement hearing;

8. On or before August 29, 2011, Plaintiffs' Counsel will separately file one or more notices of appearance on behalf of the Potential Plaintiffs who timely submitted properly completed Opt-In Forms, as well as an amended complaint on behalf of all Plaintiffs appearing in the action;

9. The court will hold a hearing at 2:30 p.m. on Monday, September 19, 2011, to consider whether to approve the proposed settlement;

10. To the extent Plaintiffs' motion seeks preliminary or final approval of the settlement, it is DENIED. The court will not evaluate the fairness of the settlement until all Plaintiffs have appeared in the action and have had an opportunity to object to the terms of the settlement; and

11. The clerk is directed to transmit copies of this Order to counsel for both parties.

________/s/_________________
DEBORAH K. CHASANOW
United States District Judge